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NAGANDRAN KALIANNA GAUNDAR

v.

MELINDA ALISON MONTEIRO & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF JC
[CIVIL APPEAL NO: S4-23-42-2003]
31 MAY 2006

C ***CIVIL PROCEDURE:*** *Striking out - Appeal against striking out - Plaintiff gave undertaking not to take action against defendant if information requested is disclosed - Whether defendant complied with request - Whether plaintiff bound by undertaking given - Whether defence of accord and satisfaction applicable - Rules of the High Court* D *1980, O. 18 r. 19*

This was the plaintiff's appeal against the senior assistant registrar for allowing the third defendant's application to strike out the plaintiff's claim against it under O. 18 r. 19 of the Rules E of the High Court. The facts showed that the third defendant received a letter from the plaintiff ('letter of request') complaining that the plaintiff was defamed in an email. The plaintiff claimed that the intranet system of the third defendant was used to defame the plaintiff and that the information on the F identity of the sender was required. The said letter offered the third defendant to disclose the required information upon the plaintiff's undertaking that the third defendant would be absolved from liability. The third respondent responded that the subject of the plaintiff's complaint was sent to its employee from G one Alison Monteiro. However, the plaintiff proceeded to file a claim against the third defendant on the ground that what was requested was the identity of the third defendant's employee who forwarded the email to two other persons. The third defendant alleged that the plaintiff breached the undertaking H and relied on the defence of "accord and satisfaction".

Held (dismissing the appeal):

(1) The plaintiff's letter of request did not actually state that the identity of the third defendant's employee was required. I The letter of request referred to the words "... sender using the intranet...". As such, the third defendant made a

reasonable interpretation of the plaintiff's request when it disclosed that the sender using the third defendant's intranet to mean the sender to the third defendant's intranet address. As the employee of the third defendant was only the forwarder of the email to the said two persons, the third defendant had rightly provided the information of the sender to be Alison Monteiro. Further, the plaintiff only responded to the third defendant's disclosed information after the lapse of six months. The plaintiff should have reacted instantly upon receipt of the information and there was no explanation by the plaintiff for such delayed a reaction. In the circumstances, the third defendant complied with the plaintiff's letter of request and the plaintiff was bound by its undertaking not to take action against the third defendant. The defence of "accord and satisfaction" was applicable and the claim against the third defendant could not be sustained. (paras 11, 12, 13, 14, 15 & 20)

Case(s) referred to:
Misliha Lagiman v. Linguaphone [2003] LNS 598 ***(refd)***
Raja Zainal Raja Hj Tachik & Ors v. British American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

Other source(s) referred to:
David Price, *Defamation Law, Procedure & Practice*, 2nd edn, p 148
Gatley on Libel and Slander, p 571

For the plaintiff - D Kalaimany; M/s Kalai & Partners
For the 3rd defendant - M Ruben (John Skelchy with him); M/s Zaid Ibrahim & Co

Reported by Usha Thiagarajah

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JUDGMENT

Rohana Yusuf JC:

[1] This was an appeal by the plaintiff in encl. 26 against the decision of the learned senior assistant registrar, who has allowed the application by Bank of America Berhad, the third defendant to strike out the claim of the plaintiff under O. 18 r. 19 of the Rules of the High Court 1980. I have dismissed the plaintiff's appeal on the grounds set out below.

C

Background Facts

[2] The plaintiff's claim against the first defendant is an action on defamation allegedly published and distributed *via* email. The claim against the third defendant is found in para. 6(b) of the statement of claim.

The said para. 6 reads:

> 6(a) At or about 5/11/2001, the 1st Defendant either in her personal capacity and or as a servant or agent of the 2nd Defendant published or caused to be published the following article entitled "Raju restaurant, PJ – Patrons Beware" defamatory of the Plaintiff in his trade through the electronic mail of the 2nd Defendant and circulated the same to the 3rd Defendant, their servants or agents.
>
> (b) At about the 5/11/2001 the servants or agents of the 3rd Defendant circulated the said article from the 3rd Defendants intranet to one Teh Yoong Yang and Cheang Hung Kok and other 3rd parties unknown and thereby further published and circulated the said article defamatory of the Plaintiff in his business ...

[3] On 26 October 2001, the third defendant received a letter from Messrs. Kalai & Partners on behalf of the plaintiff, complaining that the plaintiff had been defamed in an email. The plaintiff claimed the intranet system of the third defendant has been used and the plaintiff wanted information on the identity of the sender. The plaintiff demanded the identity from the third defendant within seven days. The said letter offered the third defendant to disclose the required information with consideration that the plaintiff will absolve the third defendant from any liability.

[4] The third defendant, through their solicitors, responded and accepted the offer, on an undertaking issued by Mr Nagandran a/l Kalianna Gaundar on behalf of the plaintiff. The undertaking was given on 27 March 2002 on behalf of the plaintiff. The said undertaking as shown in exh. COC3 in encl. 22 is reproduced below:

> I, Nagandran a/l Kalianna Gaundar (NRIC No. 610731-04-5453) of No. 27, Jalan Chantik, 46000 Petaling Jaya, Selangor Darul Ehsan. Pursuant to your letter dated 30th November 2001 do hereby unconditionally and irrevocably confirm that I shall not take any action of any kind in relation directly or indirectly following from the above matter against you.
>
> My undertaking as aforesaid is subject to you providing me the identity of the sender of the email referred to by my solicitors in their letter dated 26th October 2001.

Relying upon the above undertaking, the third defendant disclosed the following information in a letter dated 23 May 2002:

> ... we are advising you that, according to our records, the email that was the subject of your client's complaint was sent to our employee from the email address of Alison@iscbwp.my and we understand the name of the sender to be Alison Monteiro.

[5] Despite receiving the above information from the third defendant, the plaintiff proceeded to file a claim against the third defendant. The third defendant alleged that the plaintiff has breached the undertaking. The third defendant relied on the defence of "accord and satisfaction" and applied to strike out the claim of the plaintiff under O. 18 r. 19 of the RHC 1980. The plaintiff did not dispute the undertaking. The plaintiff contended that the third defendant did not comply with the plaintiff's request and thereby negated the undertaking issued by the plaintiff.

The Issue

[6] The main area of dispute is whether or not the third defendant has complied with the plaintiff's request which entitle the third defendant to the undertaking issued by the plaintiff. The answer to this question rests solely on the true and proper construction of the request by the plaintiff *vide* letter in exh. COC1 (to be referred to as the letter of request).

A **The Request By The Plaintiff**

[7] As the main thrust of the third defendant's argument was solely based on the proper and true construction of the letter of request by the plaintiff, it would therefore be necessary to
B look at the letter as a whole. The full text of which is quoted below:

Ref: K/CH/3237/01 Date: 28/10/2001

M/s. Bank of Amerika Berhad
C Wisma Goldhill, Jalan Raja Chulan, BY FAX/POST
50200 Kuala Lumpur.

Dear Sirs,

Re: Circulation of Defamatory E-mail by Person Unknown

D

We act for Mr. Nagendran a/l Kalianna Gaundar of No. 22, Jalan Cantik, 48200 Petaling Jaya, Selangor Darul Ehsan.

Our client is a sole-proprietor of a restaurant known as Raju Restaurant operating at the aforesaid address.

E

We are instructed by our client that a person or persons unknown has been circulating e-mail to various third parties highly defamatory and slanderous of our client in his trade. A copy of the e-mail is enclosed for easy reference.

F The sender of the e-mail appears to be Joanne Oh/APAC/BAC and it was sent through intranet e-mail address of Bank of America. It was sent to Mr. Teh Yoong Yang and Cheang Hung Kok at their respective intranet addresses.

As the provider of access to the intranet communication system
G by means of which the defamatory and slanderous statement was transmitted or made available by your servants or agents over whom you have effective control, you are liable to our client for the loss and distress our client has been put to suffer by reason of the publication of the aforesaid statement/e-mail.

H Take notice that we hereby demand on our client's behalf that you disclose the identity of the sender of the aforesaid e-mail within seven (7) days from the date hereof failing which we have strict instructions to institute legal action against you for various reliefs.

I

> Strictly without prejudice, take further notice that our client will absolve you from any liability on account of publication of the aforesaid e-mail through your intranet, if you comply with our clients demand and the disclosure provides sufficient evidence linking the sender to the aforesaid e-mail.
>
> Your kind co-operation is highly solicited.
>
> Thank you.
>
> Yours faithfully,
>
> sign.

[8] My plain reading and understanding of this letter can be summed up as these; The plaintiff was aware of the email circulating allegedly defamatory of him but was not sure who was the sender; Joanne Oh/APAC/BAC was forwarding the email to Mr Teh Yoong Yang and Mr. Cheang Hung Kok *via* the intranet email of the Bank of America; The third defendant was reminded of its liability to the plaintiff as provider of access to the intranet communication system where the alleged defamatory and slanderous statement were transmitted; The plaintiff wanted the third defendant to disclose the sender of the email; The plaintiff will absolve the third defendant from any liability if the plaintiff's request is met.

[9] Upon receiving the letter of request the third defendant responded, agreed to the terms and a letter of undertaking to the effect of absolving the third defendant from liability was issued. The third defendant then disclosed the information to the plaintiff by a letter in exh. COC4 dated 23 May 2002. The said letter is reproduced below:

> Pursuant to correspondence received from our counsel Zaid Ibrahim and Partners enclosing your letter of 2 April 2002 and relying on the undertaking from Mr Nagandran a/l Kalianna Gaundar, we are advising you that, according to our records the email that was the subject of your client's complaint was sent to our employee from the email address Alison@iscbwp.po.my and we understand the name of the sender to be Alison Monteiro.

In the above letter the third defendant discloses the identity of the sender of the email to the intranet email of the third defendant as Alison Monteiro and the email address was also given. It was contended by the counsel for the third defendant that this information resulted in the plaintiff citing her as the first defendant correctly in this suit. The fact of which the plaintiff did not dispute.

[10] The first time the plaintiff responded to the third defendant informing that the disclosure by the third defendant was not what was required, was *via* a letter dated 19 November 2002, exhibited in exh. K1 in encl. 18. The counsel for the plaintiff contended that the Letter of Request was clear that it aimed at getting the identity of Joanne Oh/APAC/BAC. As such the information given by the third defendant did not meet the plaintiff's letter of request. It was also the contention of the counsel for the plaintiff that the letter of request has made clear of such intention of the plaintiff.

[11] When the plaintiff responded in exh. K1 to the third defendant stating the information disclosed was not what he wanted, the plaintiff explained that his undertaking was based on the requirement of the third defendant to disclose the sender of "email through BOA intranet to Mr Teh Yoong Yang and Mr Cheang Hung Kok". Exhibit K1 went on further to say that the plaintiff was actually interested to obtain the identity of the third defendant's employee who has forwarded email to the above two persons. None of these information were stated the letter of request. In simple term the plaintiff now says the letter of request wanted the identity of Joanne Oh/APAC/BAC.

[12] I do not agree with the interpretation of the plaintiff's counsel. The letter of request refers to the word "sender using the intranet of BOA ...". Basing on the facts and the circumstances of the case Joanne Oh/APAC/BAC was actually a forwarder of the email to another two persons using the intranet system of the third defendant. Joanne Oh/APAC/BAC was not a sender of the email but merely a forwarder. It is clear that the email was forwarded to Mr Teh Yoong Yang and Mr Cheang Hung Kok from the address of Joanne Oh/APAC/BAC, using the third defendant's intranet system. Thus it is not right to term Joanne Oh/APAC/BAC as the sender.

[13] I find that the third defendant has made a reasonable interpretation of the request by the plaintiff when the third defendant disclosed to the plaintiff that the sender using the third defendant's intranet means the sender to the third defendant's intranet address. It is clear that Alison Monteiro was the sender to the intranet of the third defendant whilst Joanne Oh/APAC/BAC was only a forwarder.

[14] If the plaintiff's intention was to obtain the identity of Joanne Oh/APAC/BAC, the plaintiff could have requested for the identity of Joanne Oh/APAC/BAC directly in the letter of request. The letter of request did not specify in clear terms that he requires the identity of Joanne Oh/APAC/BAC or the third defendant's servant or agent as how he has explained further in 9 November 2002 letter. From the way the letter of request has been worded, I find the response from the third defendant to be appropriate and in compliance with the letter of request. As the sender of the email cannot be Joanne Oh/APAC/BAC, who is only the forwarder of the email, the third defendant has rightly provided the information of the sender to be Alison Monteiro.

[15] My finding is further reinforced by the conduct of the plaintiff himself. The plaintiff received the disclosed information from the third defendant in a letter dated 23 May 2002. There was no response until six months later. After the lapse of six months the plaintiff decided to respond to the third defendant in that letter dated 9 November 2002, claiming that the information disclosed was not what the plaintiff required. The plaintiff could have reacted instantly upon receipt of the information from the third defendant and not take six months to suddenly realize that the disclosure by the third defendant was wrong. There was no explanation for such delayed reaction. Thus basing on the circumstances and the communications between them I find that the third defendant has complied with the request of the plaintiff in the letter of request and the plaintiff is bound by its undertaking not to take action against the third defendant.

A **The Defence Of Accord And Satisfaction**

[16] The law on the defence of "accord and satisfaction" was discussed by learned author David Price in his book *"Defamation Law, Procedure & Practice"* – 2nd edn. According to the learned B author this defence of "accord and satisfaction" is based upon ordinary general contractual principle (see p. 148). It amounts to a claimant waiving the right to sue defendant provided that the agreement is validly entered with proper consideration. *Gatley on Libel and Slander* at p. 571 discussed the "accord and C satisfaction principle" where the learned author states that parties may settle a claim for defamation on terms they deem fit. As an example, if a party accepts apology in satisfaction of his claim a publication of apology in accordance with the agreement will be a good defence.

D **[17]** The Supreme Court case of *Raja Zainal bin Raja Haji Tachik & Ors v. British American Life & General Insurance Bhd* [1993] 3 CLJ 606, is an authority in point. The Supreme Court had in that case construed that the letter by the plaintiff intended to release all the Defendants in the suit. Basing on E such undertaking, the Supreme Court found that the action of the plaintiff against the defendant was bound to fail. The court then struck out the plaintiff's claim under O. 18 r. 19 of the RHC for being scandalous frivolous and vexatious or that it would prejudice, embarrass and delay a fair trial. F

[18] The defence of "accord and satisfaction" was applied by the Johor Bahru High Court in *Misliha binti Lagiman v. Linguaphone* [2003] LNS 598. The facts of the case were that the defendant had issued a wrong notice of the plaintiff's G resignation date from the defendant company. The date stated in the notice was 1 September 2001 but the actual resignation date of the plaintiff was 14 September 2001. Thus there was one week lapse between the two dates. The notice further notified the clients that no one should be making payment to H the defendant as of the date mentioned in the notice. The defendant had in the course of duty been collecting monies from client prior to leaving on 14 September 2001. During the two weeks period from date of notice clients continued to pay and plaintiff continued to collect. Resulting from the wrong I notice the plaintiff received threats from client accusing her of

collecting monies without authority. The plaintiff sought lawyers advice and instructed a letter be written to the defendant demanding apology and correction of the notice. The defendant apologized and issued a correction of the notice. Both demands were complied by the defendant. The High Court found that the defendant had fulfilled and complied with the demands of the plaintiff, and the defence of "accord and satisfaction" applies. The claim by the plaintiff was struck out under O. 18 r. 19 of the Rules of High Court 1980.

[19] In this case, upon the true construction of the letter of request by the plaintiff, I find that the third defendant has complied with the plaintiff's request. The plaintiff is bound by his undertaking, the defence of "accord and satisfaction" applies and the claim against the third defendant cannot be sustained. For all these reasons I dismiss the appeal notice of the plaintiff and the claim against the third defendant was struck out, for being frivolous vexatious and an abuse of court process.